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April 2016. Vol. IX, Issue IV

# INDIAN LEGAL IMPETUS®


*138th INTA Annual Meeting Meet us at Booth Number 823-825 at Orange County Convention Centre, Orlando, USA from May 22nd, 2016 to May 25th, 2016.*

# EDITORIAL

*Manoj K. Singh*
*Founding Partner*

It gives us an enormous pleasure to share with you this issue of our Newsletter 'Indian Legal Impetus'. The sheer tenacity of continuing to publish this newsletter has been strengthened by the convincing support and inputs from readers like you. I, for myself and on behalf of our team, thank you for your overwhelming response to our efforts.

Vide this issue we have tried to throw light towards the latest updates taking place in our economic scenario. Swirling updations in the Companies Act, 2013 are being proposed to bring about the ease in doing business in India. Also, a step towards women empowerment has moved an extra mile with affirmation that women by virtue of her birth shall be entitled to be Karta. Intellectual Property Rights, being a dynamic topic in the globalization today, has seen a surge in formulation of various Regulations and Rules in relation to the topics like Post Marketing Surveillance of Drugs, Computer Related Inventions, Safeguarding Traditional Knowledge, etc. Also, the necessity of an investor's vigilance when he invests in the capital market has been highlighted by one of the article. The tightening of the noose by the Government on the non-cooperative jurisdiction by upholding the stricter rules under Income-tax Act have also been highlighted vide another article.

Further, the Newsbytes section of this issue will help the readers to sniff around the recent updates brought about under various frameworks of prevailing laws in India like Foreign Exchange Management Act, 1999, Income-tax Act, 1961, FDI Policy, Companies Act, 2013, etc.

Via this issue, we hope we maintain our consistency in our objective of providing and enlightening you with the laws and recent legal developments in India. We sincerely welcome your suggestions and comments for our Newsletter and assure you the pertinacity of our efforts in inculcating your valuable insights to make 'Indian Legal Impetus' a valuable reference point and possession for all. You may send your suggestions, opinions, queries or comments to newsletter@singhassociates.in.

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## INDIAN LEGAL IMPETUS®
Volume IX, Issue IV

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# Contents

# RECOMMENDATIONS OF COMPANIES LAW COMMITTEE ("CLC"): A WAY FORWARD TO THE COMPANIES ACT, 2013.

*Kumar Deep*

## BACKGROUND:

One of the most prominent legal reforms in India is the enactment of the Companies Act, 2013 ("**Act**") with the objective of tuning the Indian company law with the global standards. The provisions of the Companies Act, 2013 have been notified in a phased manner as out of 470 sections only 283 have been enforced by April 1, 2014 and the remaining provisions are yet to be notified. Most of the provisions which are still to be notified are dependent upon the establishment of the National Company Law Tribunal ("**Tribunal**"), which is likely to be notified shortly.

The Act introduced vital changes in the company law in India, especially in relation to accountability, disclosures, investor protection and corporate governance related provisions. However, from the very first day of the enactment of the Act, it has been noted that the amended Act has been weighed down with many drafting errors and containing a range of impractical provisions which are creating lots of obscurity in its implementation. Further, in view of the extent and scope of changes, the stakeholders took some time to come up with the new regime, with the new provisions and stagger upon some difficulties in the process. Further, the plan of the Government for ease of doing business in India would also be adversely affected due to such complexity.

Due to these difficulties the stakeholders made several representations to the Government from time to time with respect to the handy difficulties being faced by them in implementation of the new Act. The Ministry of Corporate Affairs ("**MCA**") has introduced a few instant amendments in May, 2015, although several representations are still being received by the Government for further assessment of the Act.

## FORMATION OF COMPANIES LAW COMMITTEE ("CLC"/ "COMMITTEE")

Thus, to remove such convolution, the Ministry of Corporate Affairs, vide an office order dated June 4, 2015, constituted the Companies Law Committee ("**CLC**"/ "**Committee**") under the chairmanship of the Secretary, Ministry of Corporate Affairs to examine and make recommendations on the issues relating to implementation of the Companies Act, 2013. The representatives from Reserve Bank of India ("**RBI**") and Securities and Exchange Board of India ("**SEBI**") have also been co-opted as members of the CLC.

The CLC constituted of a former judge of the Delhi High Court, representatives of the Institute of Chartered Accountants of India, the Institute of Cost Accountants of India, the Institute of Company Secretaries of India and renowned persons in the industry and also co-opted representatives from RBI and SEBI as members. They have recommended several changes to the Act for the proper and effective implementation of the Act.

## RECOMMENDATIONS OF CLC AND IMPACT THEREOF:

The Committee after considering the suggestions received by it, through public consultation process and from all other stakeholders including professional institutions, chambers of industries, law firms and other regulatory bodies, submitted its report to the MCA on February 1, 2016 recommending changes in the Act and Rules framed therein.

About 100 amendments to the Act have been proposed by the CLC which includes changes in 78 sections and approximately 50 amendments to the Rules as well.

Almost all the significant areas of the Act have been proposed to be changed by the CLC such as definitions, acceptance of deposits, raising of capital, accounts and audit, management and administration, corporate social responsibility, provisions relating to corporate governance and offences & penalties etc. Some of the major changes recommended by the CLC are outlined herein below.

In order to remove ambiguities in the definitions and make them more objective, the CLC recommended modifications in the definitions of various terms used in the Act including but not limited to Associate Company, Debentures, Financial Year, Holding Company, Interested Director, Key managerial personnel, Net worth, Related Party, Small Company, Subsidiary Company and Turnover etc.

To make the process of incorporation simpler and to provide greater flexibility for carrying out business in India, the Committee proposed changes in the provisions relating to incorporation of companies by allowing unrestricted object clause in the memorandum of association and replacing affidavits with self declarations from subscribers to memorandum and first directors. Consequently, changes in various forms related to these provisions would also be anticipated.

The Committee recommended changes with respect to provisions relating to raising of capital by providing simplification of the private placement process, doing away with the requirement of separate offer letter and synchronizing the provisions of the Act with the regulations issued by other sectoral regulators. Such changes would definitely help companies in raising capital slickly.

Apart from this deal with the situation of disqualifications from appointment and vacation of office of director, the Committee recommended that the vacancy of an office should be triggered only where a disqualification is incurred in a personal capacity and a disqualification under Section 164(2) be only applicable to a person who was a director at the time of the noncompliance, and in case of a continuing non-compliance, there should be a period of six months' time allowed for a new Director to make the company compliant.

With the objective of improving transparency and quality of information concerning financial position of the companies, the Committee suggested changes to the provisions relating to accounts and audit and accordingly requirement for annual ratification of appointment/continuance of auditor has been proposed to be removed.

Further, to remove ambiguities in calculation of profits for determination of a company's obligation on corporate social responsibility, the Committee also recommended certain changes viz. the term 'average net profit' to be replaced with the words 'net profit'. In addition to this, it is also proposed that companies are not required to appoint independent directors to have CSR Committee with two or more directors.

For the amplification of corporate governance in the companies by incentivizing individuals to take up positions of responsibility and reducing the cost of compliances, the Committee recommended significant changes in the provisions relating to independent directors, nomination and remuneration committee, audit committee, disclosure of interests, loans and investments, managerial remuneration, insider trading etc. The key changes proposed in this regard *inter alia* include the requirement of Government approval for managerial remuneration to be omitted, companies may be allowed to give loans to entities in which directors are interested after passing special resolution and adhering to disclosure requirements, provisions relating to forward dealing and insider trading to be omitted from the Act as listed companies are regulated by SEBI, to do away with the requirement for a managerial person to be resident in India for 12 months prior to appointment.

In addition to above, it is worth mentioning other recommendations suggested by the Committee including exclusion of convertible notes raised by start-ups from the definition of deposits, simplification of the procedure to convert an LLP into a company, allowing start-ups to raise deposits for its initial five years without any upper limits, allowing start-ups to issue ESOPs to promoters working as employees, increasing the limits with regard to sweat equity that can be issued by a company from 25% of paid up capital to 50%, increasing the thresholds for private companies to comply with having an Independent Director, Audit Committee, Nomination & Remuneration Committee and rules regarding availability of names are being made liberal to allow for more innovative names.

## CONCLUSION:

The Committee has attempted well to take away the difficulties and challenges being faced by all the stakeholders in implementation of the Act. These recommendations are undoubtedly a welcome move which eventually help in smooth functioning of the Act and accomplish the Government's objective of ease of doing business and encouraging start-ups in India as well. We anticipate that the suggested changes should be finalized and adopted by the Government as soon as possible so that the corporate get relief from the burden of compliances and the Act become more amicable.

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# BY VIRTUE OF HER BIRTH, BE ENTITLED TO BE KARTA

*Vijaya Singh*

The Delhi High Court, in one of its landmark ruling held that if a male member of Hindu Undivided Family (HUF), by virtue of his being the first born eldest, can be a *Karta*, so can a female member.

As per the Hindu Law, an adult member who manages the affairs of the HUF is known as Karta or Manager of the family. Only a co-parcener can become a Karta.

The Nagpur High Court in the case of **CIT v Seth Laxmi Narayan Raghunathdas [1948] 16 ITR 313 (Nag.)**, while considering an issue as to whether a widow can be Karta of her husband's HUF, held as under -

*"According to the Dayabhaga Law, the foundation of a coparcenary is first laid on the death of the father. The property of the deceased, separate as well as ancestral is inherited by his male heirs as coparcenary property and is held by them as coparceners. On the death of any one of the coparceners, his heirs succeed to his share in the coparcenary property and they become members of the coparcenary. Such heirs, in default of male issue, may be his widow or widows or his daughter or daughters. These too, though females, get into the coparcenary, representing the share of their husband or father as the case may be. A coparcenary under the Dayabhaga Law may thus consist of males as well as females. It is, therefore, obvious that under the Dayabhaga Law a widow becomes a coparcener and she can consequently become the karta of the coparcenary or the joint family, although she or any other coparcener does not possess the right of survivorship, particularly if she is the only member sui juris left in the family.*

*It is true that under the Mitakshara Law, no female can be a coparcener with male coparceners, presumably, because she does not possess the right to take by survivorship, but we do not think that either this right or the status of a coparcener is a sine qua non of competency to become the manager of a joint Hindu family of which she is admitted as a member."*

Based on the above discussion, the Nagpur High Court held that a widow was competent to become the Karta of the Hindu undivided family consisting of herself and her two minor sons. It is notable that the High Court observed that there was no legal prohibition against the mother being the de facto manager.

The High Court further observed that it is beyond question that the Hindu Women's Rights to Property Act, 1937, have materially changed the status of a Hindu woman. If a coparcener gets interest in the joint family property by birth, she gets interest by marriage. She has as much right to enforce a partition of her share as a coparcener has and, except for the right of survivorship, her position is practically analogous to that of the coparcerner. No doubt the interest that she gets is a widow's estate, but in the matter of management of that estate she has the same rights and is subject to the same disabilities as the managing coparceners of a joint Hindu Family.

The Supreme Court in the case of CIT v Seth Govindram Sugar Mills [1965] 57 ITR 510 (SC) has held that a widow cannot be Karta of the HUF, though she can be a manager of HUF for the purposes of Income-tax assessment. This decision was delivered after considering the decision of Nagpur High Court in the case of Seth Laxmi Narayan Raghunathdas (supra). The Hon'ble Court had rejected the proposition of female member being Karta of HUF only on a single ground that she did not have the legal qualification of "coparcenership" for becoming Karta because as per the well-established principles of Hindu Law only a coparcener can become the Karta of HUF. Thus, as per the law it stands today a female member cannot become Karta of HUF.

Though, thereafter the Hindu Succession Act stands amended. The Hindu Succession (Amendment) Act of 2005 have paved for the recognition of a daughter as a co-parcener by birth in her own right and accorded her the same rights in the co-parcenery property that are given to a son. Post-amendment, daughters become member of the HUF on birth and are regarded as coparcener in the same manner as a son, being subject to the same rights, duties and responsibilities.

The Hon'ble High Court of Delhi in the matter *Mrs. Sujata Sharma versus Shri Manu Gupta*[CS (OS) 2011/2006] held vide its order dated 22/12/2015 that Section 6 of the Hindu Succession Act is a socially beneficial legislation and accordingly, Justice Najmi Waziri broadened the definition of "Karta" in the HUF.. It gives equal rights of inheritance to Hindu Males and Females. Its objective is to recognize the rights apropos succession. Therefore, Courts would be extremely vigilant apropos any endeavour to curtail or fetter the statutory guarantee of enhancement of their rights. Now that this disqualification has been removed by the 2005 Amendment, there is no reason why Hindu women should be denied the position of a Karta.

The Court found no restriction in the law preventing the eldest female co-parcener of an HUF, from being its Karta. Further it was held that the plaintiff's father's right did not dissipate, but was inherited by the her. Nor did her marriage alter the right to inherit the co-parcenary to which she succeeded after her father's demise in terms of Section 6. The said provision only emphasizes the statutory rights of females. Thus the Court decided and declared the Plaintiff as Karta.

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# POST MARKETING SURVEILLANCE OF DRUGS

***Rajdutt S Singh***

Post marketing surveillance is performed after market approval/clinical trials of drugs in India. The regulatory framework for conducting clinical trials of drugs is provided under the Drugs and Cosmetics Act, 1940 ("Act") and the Drugs and Cosmetics Rules, 1945 ("Rules"). Further, Part X-A and Schedule Y of the Rules specifically deal with the statutory provisions applicable for clinical trial of drugs in India. Schedule Y divides Clinical trial of drugs into 4 Phases, namely, Human Pharmacology (Phase-I), Therapeutic exploratory trials (Phase-II), Therapeutic confirmatory trials (Phase III) and Post Marketing Trials (Phase-IV).

As per Schedule Y of the Rules, Post Marketing Trials are studies (other than routine surveillance) performed after drug approval and related to the approved indication(s). These trials go beyond the prior demonstration of the drug's safety, efficacy and dose definition. These trials may not be considered necessary at the time of new drug approval but may be required by the Licensing Authority for optimizing the drug's use. They may be of any type but should have valid scientific objectives. Phase IV trials include additional drug-drug interaction(s), dose-response or safety studies and trials designed to support use under the approved indication(s), e.g. mortality/morbidity studies, epidemiological studies etc.

The Central Government (Department of Health and Family Welfare) vide its Notification (G.S.R. 287 (E)) dated 8th March, 2016 ("*Notification*") in exercise of the powers conferred under section 12 and section 33 of the Drugs and Cosmetics Act, 1940 (23 of 1940) and after consultation with the Drugs Technical Advisory Board, amended the Drugs and Cosmetics Rules, 1945, whereby the term *"Post Marketing Surveillance"* as appeared in Schedule Y of the Drugs and Cosmetics Rules, 1945 is substituted as follows:

*"**4. Post Marketing Surveillance.-***

(i) *The applicant shall have a pharmacovigilance system in place for collecting, processing and forwarding the report to the licensing authority for information on adverse drug reactions emerging from the use of the drug manufactured or marketed by the applicant in the country.*

*(ia) The system shall be managed by qualified and trained personnel and the officer in-charge of collection and processing of data shall be a medical officer or a pharmacist trained in collection and analysis of adverse drug reaction reports.*

*(ib) Subsequent to approval of the product, new drug shall be closely monitored for its clinical safety once it is marketed.*

*(ic) The applicant shall furnish Periodic Safety Update Reports (PSURs) in order to-*

*report all relevant new information from appropriate sources;*

(a) *relate the data to patient exposure;*

(b) *summarise the market authorisation status in different countries and any significant variations related to safety; and*

(c) *indicate whether changes shall be made to product information in order to optimise the use of the product."*

The term Pharmacovigilance may be defined as a continuous post-marketing monitoring system relating to the detection, assessment, understanding and prevention of adverse effects or any other drug-related problem. As per the Rules, if it is found by the drugs licensing authority that any part of any batch of the drug is not in conformity to the standards of strength, quality or purity specified in the Rules, the concerned authority may direct the manufacturer to withdraw the remainder of the batch from sale.

Now in order to effect the pharmacovigilance of drugs in India, it is obligatory on the part of applicants (e.g. manufacturers and marketing companies) that they put in place pharmacovigilance system for collecting, processing and forwarding the report to the licensing authority for information on adverse drug reactions emerging from the use of the drug manufactured or marketed by the applicant (who applied for market approval of drugs) in India. Further, pharmacovigilance system is required to be managed by qualified and trained personnel and the officer in-charge of collection and processing of data shall be a medical officer or a pharmacist trained in collection and analysis of adverse drug reaction reports.

**Conclusion:**

Prior to the Notification, it was obligatory on the part of the applicants that subsequent to approval of the product, new drugs should be closely monitored for their clinical safety once they are marketed. For this purpose, the applicants were required to furnish Periodic Safety Update Reports (PSURs) for a period of four years. However, the Notification has extended the limited scope of post marketing surveillance by including requirements of pharmacovigilance system and appointment of a medical officer to manage the said system.

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# COMPUTER RELATED INVENTION- A BOON OR A BOOM FOR CRIs INVENTOR IN INDIA

*Aayush Sharma*

## INTRODUCTION

Keeping the section 2(k) of the Patents Act, 1970 more clear and precise, the Patent office has recently issued fresh guidelines for examining the inventions related to computer in India. Earlier also, the IPO had issued the guidelines but due to unambiguous and unclear statues, the guidelines fail to establish a remarkable status in the field of Computer Related Inventions (CRIs).

Now moving ahead with the new set of guidelines, *CRIs comprise of inventions that involve the use of computer, computer network or other programmable apparatus and include such inventions having one or more features of which are realized wholly or partially by means of a computer program or programmes.* These inventions are created with the help of intellectual property contribution and thus needs a strong protection under the ambit of Patent law in India[1]. It has been seen that large number of IT companies and R&D organisations are working on the CRIs and in order to protect those valuable inventions and granted Patent of the CRIs and to prevent those companies from the heat of litigation, these guidelines will play an important role in India. Further these guidelines will also help to restrain patent offices from granting frivolous patents in India.

Many countries such as US, Japan and Europe have imposed certain restrictions for the protection of computer related inventions and an attempt has been made to maintain a good balance between domestic interest (of industry and public at large) and international obligations under Trade Related Aspects of Intellectual Property Rights (TRIPs) agreement. In view of this and being a TRIPS member, the Indian Patent Office (IPO) has laid similar restrictions in Indian Patent Act, vide section 3(k), which excludes "mathematical or business methods or a computer programmes per se or algorithms" from being patentable subject matter in India Patent law. Being frivolous in nature, the s 3(k) has always been a mystery for inventors of CRIs. The most mysterious term stated in the s. 3(k) is *per se*. However, the term "per se" has been interpreted differently and CRIs have been a topic of debate for long time, especially in absence of litigation. Indian Courts haven't got much opportunity to clear the cloud. Several times, the IPO has tried to clear the vagueness in the section with an attempt to provide a uniform manner by which claims related to the CRIs should be examined. With the increasing volume of patent applications filed in the domain, it has become necessary for the patent regime to cope up with the challenges of processing patent applications in the field of computer related inventions and related technologies to set—forth the new guidelines for-allowing-such-applications or inventions to be declared as novel and to get granted by the IPO. More specifically, the clear views are required much in section 3(k) in terms of exclusions so that qualified patents relating to CRIs can be examined promptly and timely granted. In considering all the above aspects, we believe that the new guidelines will surely waive all the past inclusions and help in increasing uniformity and consistency in the examination of such applications. The main objective of the guideline is to bring out clarity in terms of exclusions expected under section 3(k) so that eligible applications of patents relating to CRIs can be examined speedily.

As per the new guidelines for examination of Computer Related Inventions (CRIs), issued from the Office of the Controller General of Patents, Designs and Trade Marks on February 19, the examiners have to rely on three stage test in examining the CRI applications, starting with properly constructing the claim and identifying the actual contribution. If the contribution lies only in mathematical method, business method or algorithm, then the examiner denies the claim. However, if the contribution lies in the field of computer program, check whether it is claimed in conjunction with a novel hardware and proceed to other steps to determine patentability with respect to the invention. The computer program in itself is never patentable. If the contribution lies in both the computer program as well as hardware, the IPO proceeds to other steps of patentability.

1 *http://www.business-standard.com/article/economy-policy/no-patent-if-invention-lies-only-in-computer-programme-says-indian-patent-office-116022200875_1.html*

## GUIDELINES

In the recent guidelines, the IPO has listed statutory definitions of some important terms from different statutes and derived dictionary meaning of other important words, in absence of any statutory definition. Some important terms that are of importance are defined/ summarized as below.

- Algorithm (Dictionary meaning): a set of rules that must be when solving a particular problem.

- Computer (defined in The Information Technology Act, 2000 (No. 21 of 2000): "any electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic, and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software, or communication facilities which are connected or related to the computer in a computer system or computer network.

- Computer network (defined in The Information Technology Act, 2000 (No. 21 of 2000) ): "the interconnection of one or more computers through – (i) the use of satellite, microwave, terrestrial line or other communication media; and (ii) terminals or a complex consisting of two or more interconnected computers whether or not the interconnection is continuously maintained.

- Computer programme (defined in the Copyright Act 1957 under Section 2(ffc)): "computer programme" means a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result.

- Data (defined in the Information Technology Act, 2000 (No. 21 of 2000): "a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalized manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts, magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer.

- Firmware (Dictionary meaning):"a type of computer software that is stored in such a way that it cannot be changed or lost.

- Function (defined in the Information Technology Act, 2000 (No. 21 of 2000): "function", in relation to a computer, includes logic, control arithmetical process, deletion, storage and retrieval and communication or telecommunication from or within a computer.

- Hardware (Dictionary meaning):"the physical and electronic parts of a computer, rather than the instructions it follows.

- Information (defined in the Information Technology Act, 2000 (No. 21 of 2000):"information" includes data, message, text, images, sound, voice, codes, computer programmes, software and databases or micro film or computer generated micro fiche."

- Per se (Dictionary meaning):""by itself" or "in itself" or "as such" or "intrinsically" – to show that you are referring to something on its own, rather than in connection with other things.

- Software (Dictionary meaning):"the programs, etc. used to operate a computer".

Section 4.4.1 of the guideline reads as follows:

*If the patent application relates to apparatus/system/ device i.e. hardware based inventions, each and every feature of the invention shall be described with suitable illustrative drawings. If these system/device/apparatus claims are worded in such a way that they merely and only comprise of a memory which stores instructions to execute the previously claimed method and a processor to execute these instructions, then this set of claims claiming a system/device /apparatus may be deemed as conventional and may not fulfil the eligibility criteria of patentability. If, however, the invention relates to 'method', the necessary sequence of steps should clearly be described so as to distinguish the invention from the prior art with the help of the flowcharts and other information required to perform the invention together with their modes/means of implementation.*

*The working relationship of different components together with connectivity shall be described.*

*The desired result/output or the outcome of the invention as envisaged in the specification and of any intermediate applicable components/steps shall be clearly described*[2].

The guideline puts an observation that computer programmes are often claimed in the form of algorithms as method claims or system claims with some 'means' indicating the functions of flow charts or process steps. Algorithm-related claims are even wider than computer programmes claimed by them, as a single algorithm can be implemented through different programmes in different computer languages. If, in substance, claims in any form such as method/process, apparatus/system/device, computer program product/ computer readable medium belong to the said excluded categories, then such cases would not be patentable[3]. Even when the issue is related to hardware/software relation, (e.g., when the claims recite 'processor is programmed to… or 'apparatus comprising a processor and configured / programmed to…..) the expression of the functionality as a 'method', is judged on its substance. It is well established that in patentability cases, the focus should be on the underlying substance of the invention, not the particular form in which it is claimed.

The 'means' mentioned in the claims shall clearly be defined with the help of physical constructional features and their reference numerals to enhance the intelligibility of the claims. The claims in means plus function form shall not be allowed if the structural features of those means are not disclosed in the specification. Further, if the specification supports implementation of the invention solely by the computer program, then in that case, means plus function claims shall be rejected as these means are nothing but computer programme per se. Where no structural features of those means are disclosed in the specification, and specification supports implementation of the invention solely by the software, then in that case, means in the "means plus function" claims are nothing but software[4].

In light of these guidelines, it' seems that for a claim to be allowed, it should have features of hardware or means that-are novel and non-obvious. Regarding the term "per se", it was suggested that the change has been proposed because sometimes the computer programme may include certain other things, ancillary thereto or developed thereon. The intention was not to reject the CRIs merely because it includes some algorithm, or computer automation or computer program, if the claim has other elements that are inventive. However, computer programmes, as such, are not intended to be granted patent[5].

## CONCLUSION

At last, it can be seen that at an extent the new guidelines succeed in providing a better picture for the computer related inventions in India. The guideline presents some examples for inventions that are not patentable; however the guideline fails to provide any positive example, illustrating what kind of CRIs are allowed. It has been presumed that if the matter includes technical advancement but is a computer program, it may not be allowed and for a CRI to be patentable, it must be claimed in conjunction with a novel hardware. The guideline seems to indicate that a claim of CRI even after having great technical contribution, having novelty and non-obvious invention features, cannot be granted if it doesn't involve any novel hardware. The new CRI guidelines are more challenging and competitive for the IT industry in India. It is clear from the guidelines that in order to get a claim granted for CRI, the claim should clearly indicate the feature/ structure of hardware or means that have some novelty.

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2 *https://iiprd.wordpress.com/*

3 *https://www.lexorbis.com/ipos-guidelines-for-computer-related-inventions/*

4 *http://www.selvamandselvam.in/blog/guidelines-for-computer-related-inventions-makes-it-india-happy/*

5 *http://ipindia.nic.in/iponew/GuidelinesExamination_CRI_19February2016.pdf*

# HOW INDIA IS SAFEGUARDING ITS TRADITIONAL KNOWLEDGE FROM MONOPOLISATION?

*Priyanka Rastogi*

Since 2009 based on its rich past of traditional knowledge, India has successfully challenged the validity of 36 Patents Applications at Europe.[6] It was not long back that India came to know about few patents which were granted in foreign countries which were majorly based on India's Traditional knowledge. In wake of the same, India created Traditional Knowledge Digital Library [TKDL] a first of its kind effort to protect traditional knowledge from misappropriation. Following is an exposition on India's effort in the creation of Traditional knowledge database and its achievements.

## WHAT IS TRADITIONAL KNOWLEDGE?

Traditional knowledge refers to the perennial practices that have been indigenously developed, evolved, preserved and utilized over ages by local communities. This knowledge extends over a variety of realms such as medicines and agriculture, and is disseminated through stories and rituals or has been percolated through generations by word of mouth. They are basically the intellectual activity that has evolved across centuries at the community level and thus is collective knowledge of the entire community. A part of this has been described in ancient classical and other literature codified in ancient scriptures in native languages but most of the document is not documented.

## NEED OF THE DATABASE FOR TRADITIONAL KNOWLEDGE

Traditional knowledge may have high commercial value in particular medicinal effect/ property which might be effective cure for an ailment. Hence, making it a good reason for corporations and individuals to go for patent protection of such knowledge based inventions just to gain monopoly; here it is pertinent to mention that the something that is part of public knowledge in one region of the world might be totally unknown to the other regions. In the past there are cases where such knowledge is monopolized and granted patent; such as patent for wound healing properties of turmeric in 1997 at US patent trademark office (USPTO), antifungal properties of Neem at European patent office (EPO) in 2005 are two such misappropriations of India's traditional knowledge. And it took 10 years to revoke these frivolous patents apart from the huge money that was spent in the opposition proceedings. On an average, it takes five to seven years and expense between 0.2-0.6 million US dollars to oppose a granted patent[7]. For an invention to be protected under Patents it has to be novel (new) apart from non obviousness and commercial viability. Patent examiners across the globe check the patentability under these criteria. As we know traditional knowledge as such is not novel but the lack of accessibility of such information in international languages result in granting of patents which greatly hamper the rights of the local communities. So there was a greater need to provide accessibility of traditional knowledge to patent offices across the globe in International languages. Moreover there is a need to establish a common pool of traditional knowledge database of respective regions of the world so as to prevent the grant of patents based on any such traditional knowledge – which in fact shall be free for all to use and exploit.

## CREATION OF TRADITIONAL KNOWLEDGE DIGITAL LIBRARY

In order to safeguard the Traditional Knowledge wealth from misappropriation, in 1999,the Department of Ayurveda, Yoga & Naturopathy, Unani, Siddha and Homoeopathy-(AYUSH), erstwhile Department of Indian System of Medicine and Homoeopathy (ISM&H) constituted an inter-disciplinary Task Force, for creating a Traditional Knowledge Digital Library (TKDL) a database in which traditional medicinal information is digitized with accessibility in five major international languages to patent offices across the globe so that examiner may conduct a patent search to check the novelty of the invention. The project TKDL was initiated in the year 2001.

6 *www.tkdl.res.in*

7 *"Protection of Traditional Knowledge by Utilization of TKDL", published by Press Information Bureau Government of India Ministry of Science & Technology dated 21 March 2011.*

TKDL is a collaborative project between Council of Scientific and Industrial Research (CSIR), Ministry of Science and Technology and Department of AYUSH, Ministry of Health and Family Welfare, and is being implemented at CSIR. An inter-disciplinary team of Traditional Medicine (Ayurveda, Unani, Siddha and Yoga) experts, patent examiners, IT experts, scientists and technical officers are involved in creation of TKDL for Indian Systems of Medicine. It is worth mentioning here that India is the first and the only country in the world to have setup an institutional mechanism TKDL to protect its traditional knowledge in order to prevent the grant of erroneous patents[8].

TKDL has converted and structured ancient texts into 34 million A4-sized pages and translated them into English, French, German, Japanese and Spanish the major international languages. There are total 150 books that are being transcribed at TKDL so far of which 75 are ayurveda , 10 are Unani, 50 are Siddha books and the,-rest 15 Books are based on Yoga which cumulatively result in 2,37,939 Transcription of Traditional medicine formulation as per the information furnished on the official website.

TKDL provides information on traditional knowledge existing in the country, in languages and format understandable by patent examiners at International Patent Offices (IPOs), so as to prevent the grant of erroneous patents. TKDL thus, acts as a bridge between the traditional knowledge information existing in local languages such as Sanskrit, Hindi, Arabic, Urdu, Tamil etc and the patent examiners at IPOs.

The project TKDL involves documentation of the traditional knowledge available in public domain in the form of existing literature related to Ayurveda, Unani, Siddha and Yoga, in digitized format in five international languages which are English, German, French, Japanese and Spanish. Traditional Knowledge Resource Classification (TKRC), an innovative structured classification system for the purpose of systematic arrangement, dissemination and retrieval has been evolved for about 25,000 subgroups against few subgroups that were available in earlier version of the International Patent Classification (IPC), related to medicinal plants, minerals, animal resources, effects and diseases, methods of preparations, mode of administration, etc.[9]

India has so far signed TKDL access agreement with European patent office (Feb 2009), US Patent & Trademark Office (Nov 2009), Canadian Intellectual Property Office (Sep 2010), German Patent office (Oct 2009), UK Patent & Trademark Office (Feb 2010), Intellectual Property Australia (January 2011) and Japan Patent office (April, 2011); Intellectual Property Office of New Zealand is about to join the league. Access to TKDL is available to all these patent offices but it is based on non disclosure agreements. That means contents of the TKDL may only be revealed to third parties for the purposes of citation. The Non Disclosure agreement was entered just to safeguard India's interests and defy any possible misuse.

## HOW TKDL WORKS AND ITS ACHIEVEMENTS?

The TKDL is available to all patent offices that have signed a TKDL Access Agreement. Under such an agreement, patent examiners may use the TKDL for search and examination purposes. Accessibility-of entire database in leading international languages enables them to easily trawl the database to ascertain the novelty of the invention.

Third party submission is another efficient way in revoking of patents based on erroneous inventions. It could be inferred from the fact that from July 2009 TKDL team has identified 215 patent applications pertaining to Indian medicinal system and third party submissions in the form of TKDL evidence have been filed. In two such cases grant has been reversed, in one applicant has modified and in 33 other cases applicants intentionally withdrew the application It is expected that in the coming months some 179 cases that are currently in the balance will either be rejected by the EPO (European Patent Office) or withdrawn by the applicants themselves. A recent study by a TKDL expert team at the EPO shows a sharp decline (44%) in the number of patent applications filed concerning Indian medicinal systems, particularly in relation to medicinal plants[10].

8 *www.tkdl.res.in*

9 *www.tkdl.res.in*

10 *"Protection of Traditional Knowledge by Utilization of TKDL", published by Press Information Bureau Government of India Ministry of Science & Technology dated 21 March 2011.*

Based on the information available at the TKDL website four patents have been successfully revoked at Canadian Intellectual Property Office from September 2010 that to with an average time of 20 weeks from the submission of evidence. Apart from this there is a long list of patent that have been revoked and grant of patent is hindered at USPTO and other various patent offices and in many cases applicants voluntarily withdrew their applications and granted patent.

The TKDL has an integrated global biopiracy watch system that allows monitoring of patent applications related to Indian medicinal systems. It enables effective detection of attempts to misappropriate this knowledge by third parties filing applications with patent offices around the world. It means that immediate corrective action can be taken, and at zero direct cost, to prevent biopiracy. India is the only country to date to have put such a system in place.[11]

India's_success_in_safeguarding_its_traditional knowledge by the creation of TKDL has already influenced many developing countries. Even WIPO (World Intellectual property Organization) has appreciated India's effort in protecting indigenous Traditional Knowledge. In the recent past India and WIPO partnered and organized a conference for protecting-Traditional_Knowledge which was attended by representatives from 35 countries across the globe.

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11 *http://www.wipo.int/wipo_magazine/en/2011/03/article_0002.html*

# NON-OBVIOUSNESS/INVENTIVE-STEP –THE ESSENTIAL REQUIREMENT FOR BIOTECHNOLOGY PATENT PROSECUTION

*Saipriya Balasubramanian*

## INTRODUCTION:

Patent protection plays a crucial role on which the biotechnology industry's tremendous investment in research and development as well as its growth rests. The biotechnological inventions majorly includes products and/or processes of gene engineering technologies, methods of isolation of micro-organisms from culture medium, methods of mutation, cultures, mutants, transformants, plasmids, processes for making monoclonal antibodies, etc., [12] Often, the focus is laid on controversial issues surrounding biotechnology patenting such as criteria for patenting plants and animals, the patenting of gene sequences and related morality issues. Contrary to the aforesaid issues, majority of biotechnology patent applications will be decided on serious issues of patent system such as novelty, inventive step and industrial application as well as the sufficiency of disclosure and support of the description to the claims.

Obviousness, or lack of inventive development, is a ground for rejecting a claim during patent prosecution or for invalidating the claim in patent infringement litigation. An invention is unpatentable because the differences between the claim and the prior art should have been obvious at the time of invention to a person of ordinary skill in the realm of that art.

## PROVISION OF INDIAN PATENTS ACT 1970

***Section 2(1)(ja)*** : "inventive step" means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art.

Inventive step is defined as the step that makes an invention new and unique. However, there is always a never-ending debate on what exactly comprises an inventive step.

Consider the case of an isolated purified form of a protein which is not obvious if it is otherwise identical to the naturally occurring protein that is already known. The courts resorted to the traditional approach of comparing what is claimed with the prior art. In another example, if a protein is already known, but what is claimed in an invention is a gene and the gene has been isolated and purified. Such a gene clears novelty but it is difficult to assess the obviousness/inventive-step owing to the fact that a particular gene having a particular nucleotide sequence exists in principle but whether it would be obvious to one skilled in the art to identify and isolate the aforesaid gene is another hurdle.

It was held in *In re Bell* case that "it may be true that knowing the structure of the protein, one can use the genetic code to hypothesize possible structures for the corresponding gene and that one has the potential for obtaining that gene"[13], nevertheless the degeneracy of the genetic code is such that there are more than 1036 different possible nucleotide sequences in a gene that might code for a protein. Therefore, unless there is something in prior art that would suggest a researcher a particular gene in question, isolation and purification of nucleotide sequences are not obvious and may be patented as opposed to the mere hypothesis of existence of numerous nucleotide sequences that might possible encode the particular protein. Though the process for looking for the right nucleotide sequence might be known, it is not obvious to choose the right sequence from the entire human genome.

The draft guidelines issued by the Indian Patent Office, mandates to the examiner to design a comprehensive search strategy by combining various search parameters including key words, IPC, sequences etc and thorough search should be carried out in patent as well as non patent literature. The following are some of the illustrative examples mentioned in the aforesaid guidelines for assessing non-obviousness/inventive criteria of biotechnology based inventions.

*12 Guidelines For Examination of Biotechnology Applications For Patent, Office of The Controller General of Patents, Designs and Trade Marks, March 2013; available from http://www.ipindia.nic.in/whats_new/biotech_Guidelines_25March2013.pdf ,*

*13 http://nopr.niscair.res.in/bitstream/123456789/4886/1/JIPR%209%285%29%20471-480.pdf*

## PRIOR ART SEARCH FOR ESTABLISHING NON-OBVIOUSNESS OF BIOTECHNOLOGICAL INVENTIONS

It is noteworthy to analyze few examples in order to establish non-obviousness of biotechnological inventions through prior art.

Let us consider the claim of an invention as follows as an example:

"An isolated DNA sequence encoding a mature human IL-3 protein having a proline residue at position 8 of the mature polypeptide, said protein processing bone proliferation-inducing activity in a human bone marrow proliferation assay. It was mentioned that the difference with prior art is that the claimed compound at position 8, there was a proline moiety whereas in the prior art compound in the same position there was a serine molecule. When analyzed by the Controller it was found that the single variation in the amino acid sequence does not normally change the activity and function of the protein unless such change is in a critical region of the protein. Since the Applicant could not provide any evidence that the protein coded by the claimed DNA was different from that of the prior art in its chemical properties inventive step was not acknowledged.

## OBVIOUSNESS/INVENTIVE-STEP IN VIEW OF SINGLE PRIOR ART OR COMBINATION OF RELEVANT PRIOR ART DOCUMENTS

Let us consider the claim of an invention as follows as an example,

"An improved process for the production of galactooligosaccharides (GOS) of high yield and purity comprising the steps of: (i) isolating Bullera singularis and Saccharomyces sp. (ii) immobilizing the B. Singularis and Saccharomyces sp; (iii) hydrolysis of lactose by the immobilized microbial cells, said reaction being carried out until galactose content being at least 65 % and (iv) optionally concentrating the galactooligosaccharides solution."

The prior art document D1 disclosed a process for the production of galactic-oligosaccharides from lactose using immobilized B.Singularis cells. D2 disclosed the use of Saccharomyces sp. for the production of galacto-oligosaccharides from lactose. It further disclosed that Saccharomyces sp. uses lactose as a carbon source & approximately it removes 92% of glucose from the GOS mixture by fermentation without losing the GOS content. It was analyzed by the Controller that since it is evident from D2 that Saccharomyces sp. consume glucose, one of ordinary person skilled in the art would be motivated to use Saccharomyces sp. in combination with B. singularis to solve the problem of separation of saccharides and also, reducing the competitive inhibition of beta-galactosidase enzyme by glucose, which leading to high yield & purity of GOS. Thus, the claimed subject-matter lacks inventive step.

## MUTATIONS IN POLYNUCLEOTIDE/ POLYPEPTIDE CHAIN

It was mentioned in the guidelines that <u>if the claimed invention relates to a polynucleotide/polypeptide having mutation(s) in a known sequence of polynucleotide/ polypeptide, which does not result in an unexpected property whatsoever, then the claimed subject-matter lacks inventive step</u>.

In another invention it was claimed for "Pro-insulin having a C-peptide encompassing only two amino acids selected from Arg-Lys, Lys-Lys and Lys-Arg*". It is known that Human Pro-insulin is comprised of three chains, A, B and C, in the insulin the two chains are combined eliminating the third chain, i.e. the C–chain consisting of thirty amino acids). Further the Prior art discloses natural Pro-insulin having 30 amino acids C-peptide, Pro-insulin with C-peptide as short as two amino acids (Arg-Arg)

It was held by the Controller that the claim was prima facie obvious. Though the applicant argued that the yield of claimed Pro-insulin having a C-peptide expressed in yeast is 1.6 to 2.0 mmol/l whereas the yield of the prior art Pro-insulin with a C-chain of Arg-Arg is only 1.0 mmol/l such a difference in change did not constitute 'unexpected property' and hence, the subject-matter was held to be obvious.

In another example of an invention, it was claimed for 'A recombinant DNA sequence of SEQ ID NO: X encoding human interferon α2 polypeptide'. It is known from prior art the existence of a nucleic acid sequence of SEQ ID NO: X1 encoding human interferon α1 polypeptide. After thorough analysis it was held by the controller that although the claimed human interferon α2 is structurally close to the prior art's human interferon α1, the alleged invention was non-obvious as the claimed human interferon is thirty times more potent in its antiviral activity than its prior art analogue.

## CONCLUSION

From the above analyzed examples, two things are obvious,

- that Indian Patent office deals with a great number of patent applications in order to determine whether or not an inventive step exists or not.
- that there are number of different factors involved in deciding whether or not an invention is obvious.

The amount of clarity we achieve in this issue plays a vital role in determining whether a patent application will proceed to grant or whether a patent application will be rejected or a patent in suit will be declared invalid.

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# BRAND-JACKING

*Martand Nemana*

## WHAT IS BRANDJACKING?

As the "Age of Social Media" grows exponentially, so does the variety and complexity of threats facing corporations. One of the newest and most damaging threats is that of "Brandjacking," essentially the hijacking of brand's online presence, typically on a social network. Coined by combination of two words "brand" & "jacking" – "Brandjacking" usually refers to an activity whereby someone acquires or otherwise assumes the online identity of another entity for the purposes of acquiring that person's or business's brand equity. The people involved in carrying out these kinds of activities are known as "brand assassins", who blatantly infiltrate upon the hard-earned and well established intellectual property of the brand / product over a prolonged period of time. Though the involved intermediaries have limited roles to play, serving just as a platform of utilization & hosting of the process for facilitation; there exists a huge legal divide which hinders their capacities.

Intellectual property (IP) rights are the legally recognized exclusive rights to creations of the mind. The owners are granted certain exclusive rights to a variety of intangible assets, such as musical, literary, and artistic works; discoveries and inventions; and words, phrases, symbols, and designs. Common types of intellectual property rights include copyright, trademarks, patents, industrial design rights, trade dress, and in some jurisdictions trade secrets**.** Misuse of social media related IP rights are on the rise; Brandjacking and its occurrences are growing more sophisticated and better funded. Social media marketing has made the company the target though in different forms but the recoil of the instances has been wide spread.

## TYPES OF BRANDJACKING:

1. **TAKEOVER:** A complete and neat takeover of a social account is generally accomplished via hacking, phishing or other method. This results in an enormous & immediate damage since the message is coming from the actual social account of the brand and is being broadcast out to its followers.

2. **MALICIOUS IMPERSONATION:** A complete set up of a new account, impersonating the brand is carried out, typically slower to develop given the need to generate followers, but the damage can spread quickly as the impersonating messages are rebroadcast across the open social universe.

Firstly, the common average consumer always tries to identify the product based upon the distinct & unique features of identification which makes the product stand alone, distinct and be different from all other rivals in the market. To sustain the competition, the product always has to be consistent & has to safeguard the standards of quality, which make it distinct and well-known. Trying to bank upon the good will of a highly reputed and established by a well known product, not only helps to the gain quicker and faster access to the public viewpoint but also serves a head start on a platter which is completely against the said law.

Secondly, cybersquatting is the practice of registering an Internet domain name that is likely to be wanted by another person, business, or organization in the hope that it can be sold to them for a profit. It involves the registration of trademarks and trade names as domain names by third parties, who do not possess rights in such names. Cybersquatters (or bad-faith imposters) register trade-marks, trade names, business names and so on, belonging to third parties with the common motive of trading on the reputation and goodwill of such third parties by either confusing customers or potential customers, and at times, to even sell the domain name to the rightful owner at a profit.

Thirdly, "Phishing," as it is commonly known, typically involves a person (the "phisher") who sends bulk e-mails seeking to persuade the recipients to visit a fraudulent website that solicits personal, confidential, and financial information.

Because the aforesaid attacks rely on deception, an educated consumer is less likely to fall victim. It therefore is prudent for companies to routinely send their customers warnings about the perils of phishing and other online scams and also remind their customers that most of the legitimate businesses do not solicit confidential and personal information via unsolicited e-mails. Customers should be invited to report suspicious e-mails, websites, and similar activities as they're harmful because, on a personal level, a defrauded consumer may lose trust in the company whose brand was used in the phishing scam. On a larger scale, phishing tarnishes all online communications and diminishes the overall confidence consumers have in e-commerce transactions.

## SOCIAL MEDIA & BRANDJACKING

Brandjacking on Facebook usually happens through a fake profile commenting on the real brand's page answering customer questions tricking users into believing that it is the actual page responding. Anyone on Facebook can set up a page with almost any type of name and if a page or a profile is created by using a brand's trademark protected material in the profile picture and/or having a similar page name it may be hard to identify that it is not the real brand. On Twitter, a fake account may tweet on behalf of a brand and use hashtags related to the brand. Further, viral hashtags can be initiated by brand assassins that are then misinterpreted by the general public as being generated by the organization under fire. As social media feeds move fast and people rarely have time to look into things in more detail, consumers may have a hard time differentiating between real and fake accounts and may perceive messages from a fake account to be official.

One of the most intriguing recent right-of-publicity cases, *Fraley v. Facebook, Inc.*,[14] is a class action lawsuit against Facebook over its "Sponsored Stories" advertising services (now settled). This lawsuit arose after certain Facebook users found out that their names and user profile photographs were arranged by Facebook in the perimeter of newsfeeds viewed by their friends based on their "likes" of various branded products. Facebook's own admissions that such advertising has approximately doubled the value of an advertisement without an accompanying "testimonial" allowed the case to survive a motion to dismiss. Given that the plaintiffs were able to show a "direct, linear relationship between the value of their endorsements of third-party products, companies, and brands to their Facebook friends, and the alleged commercial profit gained by Facebook," the plaintiffs were allowed to continue their right-of-publicity case.

Identifying when the brand is being impersonated on social networks includes the activities outlined above in the context of phishing. Furthermore, a company can use search engines that can mine social networking sites to report upon all references to the company's name, products, executive names or other elements of the brand. Free social media search tools in this category include: *SocialMention*, *Google Alerts*, *Twitter Search*, *Twazzup*, *CrowdEye*, etc. Commercial tools include the various marketing campaign tracking tools, such as *PostRank*, and specialized products such as *Social Sentry* can help identify the problem at hand and help tracking down its source.

Once the company identifies the occurrence of brand impersonation, it can contact the corresponding social networking company, requesting that the account be shut down and, perhaps, transferred to the legitimate brand. The brand needs to clearly state why it believes the user of the social network who is impersonating the brand is violating that site's terms of services or, perhaps, breaking the law. The request needs to include sufficient evidence to establish that the request comes from the legitimate brand and showing proof (e.g., screen shots) that the specified account impersonated the brand.

The trademark registration of any aspect of a celebrity's personality is indicative of the fact that the celebrity is open to the authorized assignment or licensing of his or her personality for merchandising purposes in the class of goods and services for which registration has been sought. Secondly, the celebrity obtains a means of defending those aspects of their personality against unauthorized use. Unlike action under the tort of passing off or the Trade Practices Act, 1974, trademark registration is unique in providing a prospective form of protection for celebrity personality Social media has made Brandjacking easier than ever. Massive social campaigns have overridden the determined and strategic individuals or groups to convey the complete opposite message that was intended by the organization launching the campaign.

In India, celebrities and commercial partners can obtain some protection from trademark law but such protection may be limited in scope. Section 2(1) of the Indian Trade Marks Act, 2000, allows registration of any "sign capable of distinguishing goods and services of one person from another, any word (including personal names), design, numeral and shape of goods or their

14 830 F. Supp. 2d 785 (N.D. Cal. 2011)

packaging as trademark. Courts in India have accorded protection to film titles, characters and names under the trademark law. The first case that was dealt with character merchandizing in India was ***Star India Private Limited v Leo Burnet India (Pvt.) Ltd***[15], but jurisprudence is still emerging and character merchandising is an area yet to develop in India.

Globally, the concept of publicity rights has been evolving gradually in different jurisdictions. There are a number of international conventions or treaties relevant to the protection of performer's right. The International Convention for the Protection of Performer, Producers of Phonograms and Broadcasting Organization, 1961 (Rome Convention), TRIPS and the WIPO Performances and Phonograms Treaty, 1996 (WPPT), are some of the landmark conventions in this regard.

## LEGAL SCENARIO

Though the guiding principles[16] for intermediary liability policy in India are derived from the European Union E-Commerce Directive (2000/31/EC)[17] , such principles have been incompletely[18] , yet along with their loopholes[19], incorporated into the Rules without adapting them to the requirements of India in the current context. Under the Rules, limitation of intermediary liability has been made contingent to a privately administered takedown mechanism[20], presumably in order to provide a faster alternative to the redressal mechanisms offered by the judiciary and the executive.

Once the knowledge requirement[21] is satisfied, the takedown mechanism requires intermediaries to deliberate on the legality of the allegedly unlawful expressions and accordingly disable/remove such expressions in order to claim exemption from liability. As a result, intermediaries have donned the hat of a censor and other stakeholders such as the consumers and creators of information are expected to actively police the Internet and takedown notices to the intermediaries to ensure that free expression on the Internet does not encroach on its opposing rights and duties.

The first case that came up before the Indian Courts was ***Yahoo! Inc. v. Akash Arora and Anothers***[22]**,** in which an attempt was made to use the domain name <yahooindia.com> for Internet related services as against domain name i.e. <yahoo.com>. The Court observed that usually the degree of the similarity of the marks is vitally important and significant in an action for passing off for in such a case there is every possibility and likelihood of confusion and deception being caused. When both the domain names are considered, it is crystal clear that the two names being almost identical or similar in nature, there is every possibility of an Internet user being confused and deceived in believing that both the domain names belong to one common source and connection, although the two belongs to two different concerns.

The Yahoo! Case[23] (supra) was India's first domain name case where the defendant argued that there was a need of a legislative amendment to protect domain names or trademarks on the internet. The Indian courts disagreed and granted this protection despite the absence of specific legislation on the principles of infringing marks and passing off on the internet.

*15 2003 (2) B C R 655*

*16 "This section is revised in lines with the EU Directives on E-Commerce 2000/31/EC issued on June 8th 2000". Refer to Report of the Expert Committee (August 2005), Proposed Amendments to Information Technology Act 2000.*

*17 Article 12-15, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), Official Journal L 178 , 17/07/2000 P. 0001 – 0016.*

*18 The Rules do not clearly distinguish between different classes of intermediaries; whereas the European Union E-Commerce Directive (2000/31/EC) prescribes class specific qualifications and due diligence requirements (for mere conduits, system caching and hosting).*

*19 Both, the Rules and the European Union E-Commerce Directive (2000/31/EC), are silent about a counter notice and put-back procedure.*

*20 Rule 3 (4). "The intermediary, on whose computer system the information is stored or hosted or published, upon obtaining knowledge by itself or been brought to actual knowledge by an affected person in writing or through email signed with electronic signature about any such information as mentioned in sub-rule (2) above, shall act within thirty six hours and where applicable, work with user or owner of such information to disable such information that is in contravention of sub-rule (2)."*

*21 Section 79(3)(b) creates a knowledge requirement standard of "receiving actual knowledge" for administering the takedowns. However, Rule 3(4) prescribes an alternate standard of "obtaining knowledge by itself"; or "brought to actual knowledge by an affected person".*

*22 1999 II AD (Delhi)*

*23 1999 II AD (Delhi)*

Thereafter, the courts recognized the torts of Meta tagging, hyper linking, framing, spamming and phishing in a large number of cases forming a mosaic of decisions to protect trademarks on the internet.

Intermediaries are widely recognized as essential components in the process of exercising the right to freedom of expression on the Internet[24]. Most major jurisdictions around the world have introduced legislations for limiting intermediary liability in order to ensure that this wheel does not stop spinning. With the 2008 amendment of the Information Technology Act 2000, India joined the bandwagon and established a '***notice and takedown'*** regime for limiting intermediary liability. Most major jurisdictions around the world have introduced legislations for limiting intermediary liability in order to ensure that this wheel does not stop spinning.

If the liability of an intermediary is not limited then an intermediary would be required to pre-screen all content which would render its services impractical or technically infeasiblity. United States offers a vertical framework to limit intermediary liability. Separate liability regimes exist for:

i. copyright claims under Section 512 of the Digital Millennium Copyright Act;

ii. trademark claims under Section 32(2) of the Lanham Act; and

iii. non-intellectual property rights claims under Section 230 of the Communications Decency Act. The European Union E-Commerce Directive (2000/31/EC), in its minimum requirements, mandates a horizontal framework i.e. a single intermediary liability regime dealing with all types of claims.

Trademark, its use and protection are also given consideration and importance before taking into account the other relative angles which are deemed to have been used. Intermediary is usually a mere platform and all the necessary actions have to be taken once they're intimated of any illegal or potentially unlawful activity to ensure safety and protection of the said mark in question.

*24 Center for Democracy & Technology, Intermediary Liability: Protecting Internet Platforms for Expression and Innovation (2010).*

## CONCLUSION

While eliminating brandjacking completely, either via takeover or impersonation, it is nearly impossible, given the sheer volume of social media, having the ability to immediately detect and respond to the threat can save brands major damage and embarrassment. Goodwill of a product is the soul by which the people judge the good and establish their faith and relation along with the product. It always has been of paramount interest of any company not only to protect its interest but also to grow exponentially and this is possible only with a sound and accurate legal and protected mindset which cares for the interest of the parties involved.

This sort of detection requires sophisticated streaming big data processing and complex concept modeling to identify the brandjacking attempts within the billions of daily discussions across the open social universe. This is a major reason why an increasing number of leading brands are engaging "social intelligence services" for advanced social intelligence, threat detection and risk tracking. These command centers serve as the social eyes and ears for the brand identifying threats in real time and immediately escalating those threats to risk stewards of the enterprise, which can include Corporate Communications, Legal, Finance, Risk, Compliance or a variety or other areas.

The educated masses and specifically the younger generation which have been the main target and driving cause of companies to shift on to this digital format also need to be aware and cautious of the decisions and acts done and they could fall prey to acts which are not legal per se. Brand jacking, as one such hindrance has not only projected threats to many of the leading companies both off and on the market, but also has been a whistle blower to what could be seen as incremental rate of trademark awareness and protection. Stringent laws yet are needed to be developed to cope up with such problems at hand but awareness could serve a long way in shortening the period of risk.

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# LACK OF INVESTORS' VIGILANCE AS HIGHLIGHTED BY SHAREPRO SCAM

*Shivam Hargunani*

## INTRODUCTION:

Due to advancement of technology, now when a company declares dividend, money is transferred to the Demat account of investors electronically. Many times, it happens that the shareholders are unaware about how much dividend is paid by the company or is due to them. Investors should always keep track of their Demat account and the bank account linked to it. If they suspect any irregularity they should contact the dedicated investor cells of the company to file investor-related complaints. Investors are also generally unaware about Securities and Exchange Board of India's (SEBI) Complaints Redress System – SCORES. Investors can be defrauded due to such lack of self-vigilance as highlighted by the recent Sharepro scam.

## FACTS OF THE CASE, ACCUSATIONS AND SEBI'S AD INTERIM EX-PARTE ORDER:

Sharepro Services (India) Private Limited (Sharepro) is a SEBI Registered Category I Registrar to Issues and Securities Transfer Agent. Sharepro provides corporate registry services to over 280 listed companies with a market capitalization of Rs 8.75 lakh crores.[1] The Securities and Exchange Board of India (SEBI) had received complaints since October 2015 wherein it was alleged that Sharepro had illegally transferred dividend and shares to fraudulent accounts rather than transferring the unclaimed dividend to investor education and protection fund. Sharepro was also accused of cheating two other companies in a similar manner as revealed by Economic Offences Wing (EOW).[2]

Since it is the share transfer agency which is contracted by the company itself, it is in just the right position to know the status of the accounts of the investors who are not vigilant. Sharepro was thus able to easily manipulate the transactions. The investigation also revealed that Sharepro first identified those shareholders who had not checked their account status for a long time or were deceased. On investigation into the affairs, SEBI came across many irregularities. The dividend money was transferred to the accounts of the parties related to the promoters, management and senior employees of the company.

SEBI passed an interim order dated March 22, 2016 against Sharepro. By the said order, SEBI has restrained Sharepro and several entities linked with the management of Sharepro from buying, selling or dealing in the securities market or associating themselves with securities market, either directly or indirectly, in any manner, till further directions.[3]

It was inter-alia observed in SEBI's order that:

a) Dividends belonging to rightful investors were transferred to the persons related to the management of Sharepro.

b) Shares belonging to rightful investors were transferred to the persons related to the management of Sharepro.

The order also mentions that the conduct of Sharepro, its promoters, directors, vice president and other entities as aforementioned do not prima facie appear to be in the interest of investors and the securities market. Further, it said that necessary action has to be taken against them immediately, else it may lead to loss of investors' trust in the securities market.

SEBI mentioned that it was a fit case where pending investigation, effective and expeditious, preventive and remedial action is required to be taken by way of ad interim ex-parte order to protect further harm to the

1 *Sharepro Services barred by Sebi from associating with securities market. Available at: http://articles.economictimes.indiatimes.com/2016-03-22/news/71732404_1_protection-fund-unclaimed-dividend-securities-market.*

2 *Sharepro accused of cheating two more cos, Available at: http://www.thehindu.com/news/cities/mumbai/news/sharepro-accused-of-cheating-two-more-cos/article8420980.ece.*

3 *Ex-parte-Ad-Interim order WTM/RKA/MIRSD2/41/2016 in the matter of Sharepro Services (I) Pvt. Ltd. Available at: http://www.sebi.gov.in/cms/sebi_data/attachdocs/1458653361412.pdf.*

interest of investors and preserve the safety and integrity of the securities market.

Companies who are clients of Sharepro have been directed by SEBI to conduct a thorough audit of the records and systems of Sharepro with respect to dividends paid and transfer of securities to determine whether dividends have been paid to actual/beneficial holders and whether securities have been transferred as per the provisions of law. This audit should cover the dividends paid/transfers effected within the preceding 10 years.

As per the order this audit has to be completed within three months from the date of this order and thereafter a report has to be submitted to SEBI by the companies in this regard. They have also been advised to carry out /switchover their activities related to a registrar to an issue and share transfer agent, either in-house or through another registrar to an issue or share transfer agent registered with SEBI.[4]

## CONCLUSION:

As a regulator of the capital markets, SEBI has the duty to safeguard the interest of investors and protect the interest of the shareholders and integrity of the securities market. In order to safeguard such interest, SEBI should try to promote the vigilance of the investors rather than just restraining certain persons from accessing the capital markets. SEBI's interim order in the present case seems justified but it leaves the affected parties of the fraud (the innocent investors) to resort to only a lesson regarding awareness.

The matter in case of Sharepro scam came into light as it involved complaints by shareholders of big companies like Asian Paints but there must be many other cases involving such corporate frauds primarily taking advantage of lack of investors' lack of vigilance. The Sharepro scam is also a wake-up call for such investors.

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4 *Press release PR No. 66/2016 for Order in the matter of Sharepro Services (I) Pvt. Ltd. Available at: http://www.sebi.gov.in/cms/sebi_data/pdffiles/33392_t.pdf.*

# MADRAS HC UPHOLDS CONSTITUTIONAL VALIDITY OF SECTION 94A (1) AND STRICTER INCOME-TAX RULES FOR THE MONEY ROUTED THROUGH CYPRUS

*Arpita Karmakar*

The High Court of Judicature at Madras, vide its judgment dated 12.04.2016, has upheld the Constitutional validity of section 94A(1) of the Income tax Act, 1961 (hereinafter referred as "the Act") and CBDT Notification 86/2013 specifying 'Cyprus' as the 'Notified Jurisdictional Area' (hereinafter referred as "NJA") for the purpose of the said section.

## BACKGROUND

The petitions were filed under Article 226 of the Constitution of India praying the High Court for the issuance of the following:

i. a Writ of Declaration to declare Section 94A(1) of the Income Tax Act, 1961 (as amended) as ultra vires Articles 14, 19, 51, 253 and 265 read with Entry 82 of List 1 of VII Schedule of The Constitution of India and also being beyond the legislative competence of Parliament under Articles 246 and 248 read with Entry 10, 14, 82 and 97 of List 1 of VII Schedule of The Constitution of India;

ii. a Writ of Declaration to declare Notification No.86 dated 01.11.2013 issued by the 2nd respondent under Section 94A of the Income Tax Act, 1961 (as amended) as ultra vires Section 94A of Income Tax Act read with Articles 14, 19 and 265 of The Constitution of India; and

iii. a Writ of Declaration to declare Press Release titled Concerning_The Double_Tax_Treaty between Cyprus and India dated November 1, 2013 issued by the Ministry of Finance, Government of India as ultra vires Sections 4, 5, 94A(5) and 195 of the Income Tax Act, 1961 read with Articles 14 and 265 of The Constitution of India.

## PROVISIONS UNDER SECTION 94A AND CHALLENGED NOTIFICATION

The Section 94-A was introduced in the Income-tax Act, 1961, vide Finance Act, 2011, in respect of transactions with persons located in NJA as an anti tax avoidance measure. As per Section 94-A, the Central Government may, having regard to the lack of effective exchange of information with any country or territory outside India, specify the said country or territory as a notified jurisdictional area in relation to transactions entered into by any assessee.

Accordingly, where any person located in a notified jurisdictional area is entitled to receive any sum or income or amount on which tax is deductible under Chapter XVII-B, the tax shall be deducted at the highest of the following rates, namely:

a. at the rate or rates in force;

b. at the rate specified in the relevant provisions of this Act;

c. at the rate of thirty per cent.

India and Cyprus had already entered into an Agreement for avoidance of double taxation of income. However, since Cyprus was not providing the information requested by the Indian tax authorities under the exchange terms of the agreement, CBDT vide Notification No. 86/2013 dated 01.11.2013, specified Cyprus as a notified jurisdictional area under Section 94-A of the Act.

Accordingly, the following implications were issued by the Ministry of Finance in the press release dated 1.11.2013:

i. If an assessee enters into a transaction with a person in Cyprus, then all the parties to the transaction shall be treated as associated enterprises and the transaction shall be treated as an international transaction resulting in application of transfer-pricing regulations including maintenance of documentations [Section 94- A(2)];

ii. No deduction in respect of any payment made to any financial institution in Cyrus shall be allowed unless the assessee furnishes an authorization allowing for seeking relevant information from the said financial institution [Section 94-A(3)(a) read with Rule 21AC and Form 10FC];

iii. No deduction in respect of any other expenditure or allowance arising from the transaction with a person located in Cyprus shall be allowed unless the assessee maintains and furnishes the prescribed information [Section 94-A(3)(b) read with Rule 21AC];

iv. If any sum is received from a person located in Cyprus, then the onus is on the assessee to satisfactorily explain the source of such money in the hands of such person or in the hands of the beneficial owner, and in case of his failure to do so, the amount shall be deemed to be the income of the assessee [Section 94-A(4)];

v. Any payment made to a person located in Cyprus shall be liable for withholding tax at 30 per cent or a rate prescribed in Act, whichever is higher [Section 94-A(5)].

## BRIEF FACTS OF THE CASE:

A tripartite Agreement dated 16.10.2014 was entered into by and between the following parties:

a. an Indian company by name New Kovai Real Estate Private Limited;

b. a company incorporated in the country of and under the laws of Cyprus by name Skyngelor Limited and

c. the three petitioners of the case.

By the said Agreement, the Cyprus company, which was holding about 15,200 equity shares of the face value of INR 10 each and about 21,39,200 compulsorily convertible debentures of the face value of INR 100 in Kovai Real Estate Private Limited, agreed and undertook to sell all those shares and debentures to the writ petitioners of the case. Payment of the purchase consideration was agreed to be done in 4 tranches.

After three months of the execution of the aforesaid Securities Purchase Agreement, proceedings were initiated in terms of section 94-A (1) and the Notification No.86/2013 and the petitioners were called upon to show cause as to why each one of them should not be treated as an assessee in default for non deduction of tax at source, warranting the initiation of proceedings under Section 201(1)/201(1A) of the Act.

Accordingly, the petitioners challenged the Constitutionality of Section 94-A (1), the Notification dated 1.11.2013 and the Press Release dated 1.11.2013.

## DECISION HELD

1. **Constitutionality of Section 94-A (1)**

The contention of the petitioners is that once India has entered into a Treaty with another country and such Treaty has also been notified under Section 90 of the Income Tax Act, 1961, the Treaty becomes a law under Article 253. Therefore, the Parliament is not competent to enact any law by invoking Article 245(1), as the power under Article 245(1) is subordinate to the power under Article 253 and accordingly, Section 94-A(1), in as much as it confers a power upon the Central Government to specify by notification, any country as a notified jurisdictional area, without reference to the existence of a Treaty with that country, is violative of Articles 14, 19(1)(g), 51, 245, 253 and 269 of the Constitution.

As a complete answer, to the challenge of the petitioner on the power of the Parliament, to enact Section 94A, despite the existence of an agreement entered into under Section 90 (1) of the Act, a paragraph was cited from the judgment of Supreme Court given in the case of Ram Jethmalani Vs. Union of India [2011 (8) SCC 1]:

*"The Government cannot bind India in a manner that derogates from the Constitutional provisions, values and imperatives."*

Accordingly, the High Court held that Section 90(1)(c) cannot be diluted by Section 94A(1) overlooking the fundamental fact that if the purpose of the Central Government entering into an agreement under Section 90(1) is defeated by the lack of effective exchange of information, then Section 90(1)(c) [i.e. exchange of information for preventing the evasion of tax] is actually diluted by one of the contracting parties and not by Section 94A(1).

2. **Vires of the Notification dated 1.11.2013 :**

   It was brought to the notice by the High Court that the Section 94-A(1) uses the phrase "***any country or territory***". We cannot read the said phrase to mean "***any country or territory other than those covered by Section 90(1).***" Therefore, any Notification by the Central Government, issued under Section 94A (1), is also in exercise of delegated power under the said section.

   Also, the provisions of DTAA entered into by India with Cyprus on 21.12.1994, contains an obligation for the exchange of information. According to the Union of India, they had been making a number of requests to Cyprus, before issuing the Notifications, for providing relevant information such as details of the beneficial ownership of the persons making huge investments in India and the source of such funding. But the government of Cyprus failed to do so.

   Accordingly, the notification issued was not ultra vires under the section 94A (1).

3. **Vires of the Press Release dated 1.11.2013**

   The challenge of the petitioners to the Press Release is that it mentions "***any payment***" made to a person located in Cyprus, to be liable for withholding of tax at 30% in terms of Section 94-A(5). According to the petitioners, Section 94-A(5) uses the expressions "any sum", "income" and "amount" and that each of these expressions (1) sum, (2) income, (3) amount and (4) payment, has different connotations under the Act and that instead of borrowing the very same language used in Section 94-A(5), the Press Release has used the expression "any payment". Therefore, it is his contention that the Press Release runs contrary to the statutory prescription and hence liable to be set aside.

   The High Court held the following:

   i. Sub-Section (5) of Section 94-A is worded from the point of view of the recipient of any sum, income or amount whereas the Press Release is worded from the point of view of the person making the payment.

   ii. The Press Release is not a legal document, but a note intended for the benefit of the common man. Therefore, the words and expressions used therein cannot be tested on the strength of Law Lexicons.

   Therefore, the question of assailing the Press Release does not arise.

## CONCLUSION

Therefore, as per the High Court of Madras, the challenges to Section 94-A (1), the Notification dated 1.11.2013 and the Press Release dated 1.11.2013 vide the writ petitions were not held to be sustainable in law.

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## FOREIGN EXCHANGE MANAGEMENT (DEPOSIT) REGULATIONS, 2016

The Reserve bank of India released Notification No. FEMA 5 (R)/2016-RB, dated 01.04.2016, wherein it has notified the Foreign Exchange Management (Deposit) Regulations, 2016 in exercise of the powers conferred by clause (f) of sub-section (3) of section 6, sub-section (2) of Section 47 of the Foreign Exchange Management Act, 1999 (42 of 1999) and in supersession of Notification No. FEMA 5/2000-RB dated May 3, 2000, as amended from time to time.

RBI has notified these regulations in respect of deposits between a person resident in India and a person resident outside India.

Following are the major highlights of the new regulations:

1. These regulations mention that they shall come into force from the date of their publication in the official Gazette except sub-regulation (2) of regulation 7 is deemed to have come into force with effect from 21st January, 2016. These regulations were published in the Official Gazette of Government of India, dated 01.04.2016 [G.S.R. No. 389(E)].

2. Definitions: Some of the important definitions provided in these regulations are:

    a. 'Authorized bank' means a bank including a co-operative bank (other than an authorized dealer) authorized by the Reserve Bank to maintain an account of a person resident outside India;

    b. 'Deposit' includes deposit of money with a bank, company, proprietary concern, partnership firm, corporate body, trust or any other person;

    c. 'Non-Resident Indian (NRI)' means a person resident outside India who is a citizen of India;

    d. Authorised dealer, Foreign Currency Non-Resident (Bank) (FCNR (B)) account, Non-Resident External (NRE) account, Non-Resident Ordinary (NRO) account, Person of Indian Origin (PIO) etc. have also been defined.

3. As per the regulations, a person resident in India shall not accept any deposit from, or make any deposit with, a person resident outside India without prior permission from RBI.

4. Exemptions have been granted from applications of these regulations to the following:

    a. Deposits held in rupee accounts maintained by foreign diplomatic missions and diplomatic personnel and their family members in India with an authorized dealer;

    b. Deposits held by diplomatic missions and diplomatic personnel in special rupee accounts namely Diplomatic Bond Stores Account to facilitate purchases of bonded stocks from firms and companies who have been granted special facilities by customs authorities for import of stores into bond, subject to conditions provided in the regulations;

    c. Deposits held in accounts maintained in foreign currency by diplomatic missions, diplomatic personnel and non-diplomatic staff, who are the nationals of the concerned foreign countries and hold official passport of foreign embassies in India subject to conditions provided in the regulations;

    d. Deposits held in accounts maintained in rupees with an authorized dealer by persons resident in Nepal and Bhutan;

    e. Deposits held in accounts maintained with an authorized dealer by any multilateral organization and its subsidiary/ affiliate bodies and officials in India of such multilateral organizations, of which India is a member nation.

5. As per the regulations, an authorized dealer in India may accept deposit:

    a. under the Non-Resident (External) Account Scheme (NRE account), from a non-resident Indian;

b. under the Foreign Currency (Non-Resident) Account Banks Scheme (FCNR(B) account) from a non-resident Indian;

c. under the Non-Resident (Ordinary) Account Scheme (NRO account) from any person resident outside India;

6. Deposits under NRE and NRO Account Schemes may also be accepted by an authorized bank, subject to conditions prescribed by RBI.

7. Deposits under FCNR(B) Account Schemes may also be accepted by a Regional Rural Bank, subject to conditions prescribed by RBI.

8. Any person resident outside India having a business interest in India may open, hold and maintain with an authorized dealer in India, a Special Non-Resident Rupee Account (SNRR account).

9. Resident or non-resident acquirers may open, hold and maintain Escrow Account with Authorized Dealers in India subject to certain conditions.

10. A company registered under Companies Act, 2013 or a body corporate may accept deposits from a non-resident Indian or a person of Indian origin on non-repatriation basis, subject to certain terms and conditions.

11. An Indian company may also accept deposits by issue of Commercial Paper to a non-resident Indian or a person of Indian origin or a foreign portfolio investor registered with the Securities and Exchange Board of India subject to the certain conditions as prescribed.

12. A deposit made by an authorized dealer with its branch, head office or correspondent outside India, and a deposit made by a branch or correspondent outside India of an authorized dealer, and held in its books in India, shall be governed by the directions issued by the Reserve Bank in this regard from time to time.

13. A shipping or airline company incorporated outside India, may open, hold and maintain a Foreign Currency Account with an authorized dealer for meeting the local expenses in India of such airline or shipping company if the credits to such accounts are only by way of freight or passage fare collections in India or by inward remittances through banking channels from its office outside India.

14. An authorized dealer in India, may subject to the directions issued by the Reserve Bank, allow unincorporated joint ventures (UJV) of foreign companies/ entities, with Indian entities, executing a contract in India, to open and maintain non-interest bearing foreign currency account and a SNRR account for the purpose of undertaking transactions in the ordinary course of its business.

15. An authorized dealer in India, with the prior approval of Reserve Bank, may open an account expressed in foreign currency in the name of a person resident outside India for the purpose of adjustment of value of goods imported into India against the value of goods exported from India in terms of an arrangement voluntarily entered into by such person with a person resident in India.

16. Authorized dealers may provide nomination facility in respect of the deposits/ accounts in these regulations maintained by individual account holders.

## HUF OR ITS KARTA CANNOT BECOME A PARTNER OR DESIGNATED PARTNER IN LLP

The Ministry of Corporate Affairs, the Government of India, in its General Circular No. 02/2016 dated 15.01.2016, clarified the position of partners and designated partners (DP) in Limited Liability Partnership (LLP). As per Section 5 of LLP Act, 2008, only an individual or body corporate can be a partner or DP in LLP. After applications from Hindu Undivided Family (HUF)/Karta of such families surfaced for becoming partners or DP in LLPs, the Ministry clarified that HUF or its Karta cannot become a partner or DP in LLPs.

A "body corporate" for this purpose is defined in section 2(11) of the Companies Act, 2013 which states that, any company incorporated outside India can be a body corporate provided it is not a co-operative society registered under the Co-operative Societies Act and any other body corporate as specified by the Central Government by way of notification. A notification in this regard was issued by the Ministry vide its General Circular No. 13/2013 dated 29.01.2015 in consultation with Ministry of Law. However, since General Circular No. 13/2013 mentioned about 'designated partner' but did not mention about 'partner', therefore, the present General Circular No. 02/2016 was released.

## GOVERNMENT EXEMPTS HOUSING FINANCE COMPANIES FROM XBRL FILINGS

Ministry of Corporate Affairs (MCA) released a Notification No. GSR 397(E) [F.NO.1/19/2013-CL-V] dated 4-4-2016, wherein it has notified the Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Amendment Rules, 2016.

XBRL, or Extensible Business Reporting Language, provides a common, electronic format for business reporting. Companies having paid up capital of at least Rs 500 crore or those with a turnover of Rs 100 crore or more have to follow XBRL rules.

Rule 3 of the Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2015 deals with filing of financial statements with Registrar. The proviso of the said Rule 3 earlier provided that the companies in Banking, Insurance, Power Sector and Non-Banking Financial companies are exempted from XBRL filing.

The said Amendment Rules have now amended this proviso to provide that apart from the companies aforementioned, now housing finance companies need also need not file financial statements under Rule 3.

## FOREIGN EXCHANGE MANAGEMENT (REMITTANCE OF ASSETS) REGULATIONS, 2016

The Reserve bank of India released Notification No. FEMA 13 (R)/2016-RB, dated 01.04.2016, wherein it has notified the Foreign Exchange Management (Remittance of Assets) Regulations, 2016 in exercise of the powers conferred by Section 47 of the Foreign Exchange Management Act, 1999 (42 of 1999) and in supersession of Notification No. FEMA 13/2000-RB dated May 3, 2000, as amended from time to time.

RBI has notified these rules in respect of remittance outside India by a person whether resident in India or not, of assets in India. Following are the major highlights of the new regulations:

1. These regulations mention that they shall come into force from the date of their publication in the official Gazette. These regulations were published in the Official Gazette of Government of India, dated 01.04.2016 [G.S.R. No. 388(E)].

2. Definitions: The regulations have defined 'The Non-Resident Indian' (NRI) and 'Person of Indian Origin' (PIO) to have the same meaning assigned under the Foreign Exchange Management (Deposit) Regulations, 2016. Also, the regulations have defined 'Remittance of asset' to mean remittance outside India of funds representing a deposit with a bank or a firm or a company, provident fund balance or superannuation benefits, amount of claim or maturity proceeds of Insurance policy, sale proceeds of shares, securities, immovable property or any other asset held in India in accordance with the provisions of the Act or rules or regulations made there under.

3. The regulations prohibit any person, whether resident in India or not, to make remittance of any asset held in India by him or by any other person without prior permission from RBI.

4. Permission for remittance of assets in certain cases have been provided to the following persons in accordance with the conditions prescribed in the regulations:

   a. A citizen of foreign state, not being a Person of Indian origin (PIO) or a citizen of Nepal or Bhutan;

   b. A Non-Resident Indian (NRI) or a Person of Indian Origin (PIO);

   c. An authorized dealer in India.

5. Permission has been given to an Indian entity to remit the amount being its contribution towards the provident fund/ superannuation/ pension fund in respect of the expatriate staff in its employment that are resident in India but not permanently resident therein.

6. Permission for remittance of assets on closure or remittance of winding up proceeds of branch office/ liaison office (other than project office) may

be granted on application to the Authorized Dealer along with supporting documents.

7. Specific permission may be obtained from RBI by a person who desires to make a remittance of:

    a. Assets exceeding USD 1,000,000 per financial year;

    b. Remittance to a person resident outside India on the ground that hardship will be caused to such a person if remittance from India is not made.

8. Any transaction involving remittance of assets under these regulations shall be subject to the applicable tax laws in India.

## AMENDED PROVISIONS PERTAINING TO FRAUD ACCOUNTS

The Reserve Bank of India vide its notification dated 18.04.2016 reviewed an earlier notification DBR.No.BP.BC.83/21.04.048/2014-2015 dated 01.04.2015 and issued amended provisioning norms with respect to accounts declared as Fraud Accounts to all scheduled commercial banks except the regional rural banks.

The detailed guidelines for provisions pertaining to Fraud Accounts are as under:-

1. The amount due to the banks or for which the bank is liable (including the case of deposit accounts) should be provided immediately after the fraud is detected and any financial collateral adjustments with regard to basel iii capital regulations shall be adjusted with regard to the fraud accounts.

2. The banks are now given an option to make such aforementioned provisions over a period of four quarters commencing from the quarter in which the fraud was detected.

3. If the banks take more than one financial year while providing for the full provisioning being made, they should debit "other reserves" by credit to provisions by the amount still not provided at the end of financial year. The provisioning should be completed in the subsequent quarters of the next financial year by debiting the profit and loss account, after reversing the debits to "other reserves".

    The "other reserves" mentioned above are other than the reserves that are made under section 17(2) of banking regulation act, 1949.

4. The banks shall also make disclosures about the number of fraud accounts, amount involved, provisions made during the year and unamortised provisions debited to "other reserves" at the end of the year.

5. The banks should adhere to the guidelines issued on classification and reporting of frauds contained in the circular no. Dbs.Co.Cfmc.Bc.No.1/23.04.001/2014-2015 Dated 1st july, 2014 pertaining to "Frauds – classification and reporting".

## ACCEPTANCE OF DEPOSITS BY INDIAN COMPANIES FROM A PERSON RESIDENT OUTSIDE INDIA FOR NOMINATION AS DIRECTOR

The Reserve Bank of India vide A.P. circular no. 59 (DIR Series) dated 13.04.2016 cleared the ambiguous position on deposits made by a person or on behalf of any other person residing outside India for nomination as a director in an Indian company. The clarification was given in regard to Regulation 3 of the Foreign Exchange Management (Deposit) Regulations, 2016 which states that no person resident in India shall accept a deposit from, or make any deposit with, a person resident outside India without the prior permission of RBI.

RBI has cleared the ambiguity by stating that, the deposits made by any person to nominate himself or any other person for the position of Director with the company, does not need any specific approval from the Reserve Bank under Notification No. FEMA 5(R)/2016 RB dated 01.04.2016. This is in accordance with Section 160 of Companies Act, 2013 wherein, any such deposit made would be considered a current account (payment) transaction and as such, does not require any approval from the Reserve Bank. Also, the refunds of such deposits arising in event of selection of person as director or getting more than twenty-five percent shares shall be treated similarly.

## 100 % FDI IN E-COMMERCE MARKETPLACE – DIPP DEFINES THE RULES

The Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce and Industry has released Press Note No. 3 (2016 series) dated 29th March, 2016 wherein it has released guidelines for Foreign Direct Investment on E-commerce .

In order to provide clarity to the FDI policy, following guidelines were provided:

1. Definitions have been provided for 'E-commerce', 'E-commerce entity', 'Inventory based model of E-commerce' and 'Market place based model of E-commerce'.

   E-commerce now includes buying and selling of goods and services over any digital or electronic network. E-commerce entity would include any company conducting E-commerce business in India.

   Inventory based model of E-commerce is defined as an inventory based model where inventory is owned by the E-commerce entity and is sold directly to the consumers (B2C).

   Market place based model of E-commerce is defined as providing of an IT platform and acting as a facilitator between the buyer and seller.

2. It has been clarified that 100 % FDI under automatic route is permitted in market place model of E-commerce and FDI is not permitted in inventory based model of E-commerce.

3. Digital and electronic network will include network of computers, television channels and any other internet application used in automated manner such as web pages, extranets, mobiles etc.

4. Market place E-commerce entities can enter into B2B transactions with the sellers registered on its platform.

5. E-commerce marketplace may provide support services to sellers in respect of warehousing, logistics, order fulfillment, call centre, payment collection and other services.

6. E-commerce entity providing a marketplace will not exercise ownership over the inventory i.e. goods purported to be sold. Such an ownership over the inventory will render the business into inventory based model.

7. An E-commerce entity will not be permitted to undertake more than 25% of the sales through its marketplace from one vendor or their group companies.

8. In marketplace model goods/services made available for sale electronically on website should clearly provide name, address and other contact details of the seller. Post sales, delivery of goods to the customers and customer satisfaction will be the responsibility of the seller.

9. In marketplace model, payments for sale may be facilitated by the E-commerce entity in conformity with the guidelines of the Reserve Bank of India.

10. In market place model, any warrantee or guarantee of goods and services sold will be responsibility of the seller.

11. E-commerce entities providing marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field.

12. Guidelines on cash and carry wholesale trading as given under FDI policy will apply on B2B E-commerce.

13. Sale of services through E-commerce will be under automatic route subject to the conditions of FDI policy on service sector and applicable laws/ regulations, security and other such conditions.

## ABANDONMENT IN INDIAN TRADEMARK OFFICE: LIST OF EVENTS

The Office of Comptroller General of Patents, Designs and Trademarks, between the 28th and 31st March 2016 took ancillary & intense steps against approximately 1.95 lakh applications which were due for processing at various stages in various departments of the office. The highlight of the motion was 31st March 2016 when around 52,000 orders were issued in a single date for abandonment of the application.

The reason given for the said step by the Registrar of Trademark was to avoid congestion of applications to facilitate in smooth functioning of the office, periodical disposal of pending applications and files is practiced across several countries as mentioned in the Madrid Protocol. Although the reasons provided by the Registrar were in accordance with the spirit of Trademark Law followed internationally but the execution was not in accordance with the law and numerous applications were abandoned without following proper procedure provided under the Trademarks Act, 1999.

The Intellectual Property Attorney Association approached the Registrar of Trademarks in this regards and brought to his notice the gross negligence of law. Taking into consideration the plea of the Intellectual Property Attorney Association, the Registrar of Trademark came up with an order wherein the time was provided to all the applicants whose applications were abandoned erroneously to file their reply till 30th April, 2016. The notice dated 04.04.2016 from the Office of The Comptroller General of Patents, Designs and Trademarks read:

> *"This office has taken steps to treat the applications as abandoned in which no reply to examination report containing office objections to acceptance of the applications for registration has been received within the period of 30 days as per Trade Marks Act, 1999 and rules made there under. It is pertinent to mention that in all such matters the examination reports were already posted on the official website and were also sent to the applicants or their authorized agents concerned individually"*

Not satisfied with the order of the Registrar of Trademarks, the Intellectual Property Attorney Association approached the Hon'ble High Court for an urgent hearing of the matter on 05.04.2016 where the uncanny act of the Trademark registry of abandoning several applications at once without providing ample time and notice was taken into keen discussion.

The Hon'ble High Court of Delhi on 05.04.2016 passed an order on Writ Petitions WP (C) 3043/2016 & 3067/2016 and have stayed the orders of abandonment passed by the Registrar on or after 20/03/2016 till further notice. The order read:

> *"Keeping in view the startling figures of disposal within a short period of time as well as the serious allegations in the present writ petition, the orders of the abandonment passed by the respondents on or after 20th March, 2016 are stayed. Also, till further orders, the respondents shall not treat any Trade Mark applications as abandoned without proper notice to an effected party as provided under Sections 21, 128 and 132 of the Trade Marks Act, 1999"*

After the order passed by the High Court of Delhi, The Office of Comptroller General of Patents, Designs and Trademarks, on 11.04.2016 has issued a public notice accepting the erroneous method and course of actions which followed and has now requested all the applicants and the authorized agents affected by the same to submit relevant supporting documents by 30.04.2016 to further formulate and carry out necessary steps in the process. The order for abandonment of trademark applications after 20/03/2016 has now been kept in abeyance as per the order of the Hon'ble Delhi High Court.

## PAYMENT OF INTEREST ON REFUND UNDER SECTION 244A OF EXCESS TDS DEPOSITED UNDER SECTION 195 OF THE INCOME TAX ACT, 1961

The Central Board of Direct Taxes, Ministry of Finance vide Circular No. 11/2016, dated 26th April 2016, clarified that if a resident deductor is entitled for the refund of tax deposited under Section 195 of the Income Tax Act, then it has to be refunded with interest under section 244A of the Act, from the date of payment of such tax.

As per section 195 of the Income-tax Act, any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in sections 194LB, 194LC or 194LD] or any other sum chargeable under the provisions of this Act (not being income under the head of salaries) shall deduct the income tax at the rates being in force, before paying such amount to the payee.

Section 244A of the Income-tax Act provides that if any amount of refund becomes due to the assessee under the income-tax Act, he shall, subject to the provisions of this section, be entitled to receive, in addition to the said amount, simple interest thereon calculated in the manner provided under the said section.

This clarification is issued by CBDT as a consequence to decision of the Hon'ble Supreme Court of India in the case of Tata Chemical Limited (2014-LL-0226-164 NJRS Citation), Civil Appeal No. 6301 of 2011 vide order dated 26.02.2014, wherein the apex court held that "*Refund due and payable to the assessee is debt-owed and payable by the Revenue. The Government, there being no express statutory provision for payment of interest on the refund* *of excess amount/tax collected by the Revenue, cannot shrug off its apparent obligation to reimburse the deductors lawful monies with the accrued interest for the period of undue retention of such monies. The State having received the money without right, and having retained and used it, is bound to make the party good, just as an individual would be under like circumstances. The obligation to refund money received and retained without right implies and carries with it the right to interest."*

## ROUND UP OF THE UNION BUDGET 2016

In addition to the highlights of the Budget-2016 in our previous issue of Newsletter Vol. IX, Issue III, another round-up of the same is briefed below:

A. **Proposals under Direct Taxation laid for promoting Economic Growth:**

1. It has been proposed to provide that the non-compete fee received/receivable in relation to not to carry out any profession will be chargeable to tax as an income from business or profession.

2. Where a trust or institution Registered u/s 12AA of the Income-tax Act ceases to be charitable organization, the amount of net asset as on date of such conversion which represents the income accreted to the trust over a period of time shall be charged to an additional income-tax at the maximum marginal rate. Similarly, if on dissolution a charitable trust or institution does not transfer all its assets within one year of dissolution to another charitable organization, the amount of accreted income to the extent not transferred shall be subject to this levy of additional income-tax.

3. The buyback of shares by a company shall mean purchase of its own shares in accordance with relevant provisions of the Companies Act and that the distributed income shall mean, the consideration paid on buyback of shares as reduced by the amount received by the company for issue of such shares to be determined in the prescribed manner.

4. It has been proposed to amend section 139 of the Income-tax Act so as to provide that,-

   i. A person shall be required to furnish his return of income if this total income during the previous year without claiming exemption under section 10(38) exceeds the maximum amount which is not chargeable to tax.

   ii. A person, who has not furnished a return for any previous year by the due date, may furnish the same before the end of the relevant assessment year or before the completion of the assessment, whichever is earlier. He may also revise such return before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment, whichever is earlier.

   iii. A return furnished in response to a notice issued under section142 (1) of the Income-tax Act cannot be revised.

5. Also, the proposal of amending the provisions of the following sections has been proposed:

   - Section 211 of the Income-tax Act to provide that the number of installments and due dates for payment of advance tax in the case of individuals, HUFs, firms, etc. shall be the same as is applicable to companies. It was also proposed that the taxpayer eligible for presumptive taxation scheme under section 44AD of the Income-tax Act shall pay whole amount of advance tax in one installment on or before the 15th March of the financial year.

   - Section 253 of the Income-tax Act has been proposed to be subject to amendment to provide that no appeal shall be filed by the Income-tax Department against the direction of the Dispute Resolution Panel.

   - Section 254 of the Income-tax Act to reduce the time limit for rectifying an order passed by Appellate Tribunal from 4 years to 6 months.

   - Section 281B of the Income-tax Act to provide for revocation of attachment of property in cases where assessee furnishes a Bank Guarantee from a scheduled bank of an amount not less than the fair market value of such property or of an amount sufficient to protect the interest of revenue.

   - Section 147 of the Income-tax Act to provide that a case may be reopened by the Assessing Officer on the basis of information culled out from the data base by the Directorate of Systems indicating that income has escaped assessment.

6. As a step forward in digitization of processes of the Income-Tax Department, it has been decided to

provide that notices and documents may be issued by the income tax authorities in electronic form also.

7. With a view to reduce litigation and to collect taxes at the earliest point of time the scope of adjustment has been expanded that can be done at the time of processing of return under sub- Section 143(1) of the Income-tax Act. It has also been proposed that before making an assessment u/s 143(3) of the Act, a return shall be processed u/s 143(1) of the Act.

B. **Indirect Taxation**

1. Tax proposals- reducing litigation and providing certainty in taxation: Amendment proposed in CENVAT Credit Rules, 2004, to improve credit flow, reduce the compliance burden and associated litigation, particularly those relating to apportionment of credit between exempted and non-exempted final products/services. The amendments in these rules will also enable manufactures with multiple manufacturing units to maintain a common warehouse for inputs and distribute inputs with credits to the individual manufacturing units.

2. Incentivizing domestic value addition under 'Make in India', facility of payment of service tax being extended on receipt basis to 'One Person Company' (OPC) came with effect from 01.04.2016.

3. In order to bring about ease of doing business, with effect from 01.04.2016, number of returns for central excise assessee, above a certain threshold, is being reduced, from 27 to 13, i.e. one Annual and 12 Monthly Returns. The annual return will also have to be filed by service tax assessees, above a certain threshold, taking total number of returns to three in a year for them.

4. Chief Commissioners of Central Excise are being instructed to file application for withdrawing prosecution in cases involving duty less than rupees five lakh and pending for more than fifteen years.

5. The amendment has been brought under the Prevention of Money Laundering Act, 2002, The Smugglers And Foreign Exchange Manipulators (Forfeiture Of Property Act, 1976 And Narcotics Drugs And Psychotropic Substances Act, 1985. Under this, the three Tribunals established under these Acts shall be merged and the Appellate Tribunal established under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 shall be the appellate Tribunal for hearing the appeals against the orders made under all these three Acts.

6. Section 14A under the Foreign Exchange Management Act [FEMA], 1999 has been inserted to incorporate provisions contained under the Second Schedule appended to the Income-tax Act, 1961, so as to empower an officer not below the rank of Assistant Director to recover arrears of penalty under the FEMA 1999 by exercising the powers conferred under the Income-tax Act, 1961.

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# NOTES